***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 76-2155

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MACIO ENNIS,

Petitioner-Appellant,

-against-

E. LeVRE, Superintendent,
Clinton Correctional Facility,

Respondent-Appellee.

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Docket No. 76-2155

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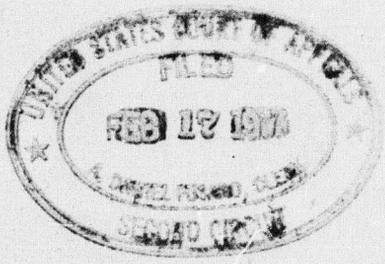
P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MACIO ENNIS
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

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UNITED STATES COURT OF APPEALS
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E. LeVRE, Superintendent,
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Docket No. 76-2155

# BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## QUESTIONS PRESENTED

1. Whether due process was denied to appellant, an indigent, by the State's refusal to provide the transcript of the Wade hearing for purposes of direct appeal.

2. Whether appellant was denied effective assistance of counsel by the knowing failure of his assigned appellate counsel to obtain the missing transcript of the Wade hearing for purposes of the direct appeal.

## STATEMENT PURSUANT TO RULE 28(a)(3)

### Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Costantino, J.) entered October 12, 1976, denying appellant Macio Ennis' application pursuant to 28 U.S.C. §2254 for a writ of habeas corpus. On November 17, 1976, the district court issued a certificate of probable cause limited to the question of whether appellant, an indigent, had been denied due process on the direct appeal of his conviction because the transcript of the Wade hearing was missing from the appellate record.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, to represent Mr. Ennis on appeal, pursuant to the Criminal Justice Act.

### Procedural Background

On August 19, 1974, appellant Macio Ennis was convicted, after jury trial in New York Supreme Court, Kings County, of kidnapping in the second degree, and was sentenced to 15 years in prison. On December 31, 1975, the Appellate Division, Second Department modified the conviction on the law and the facts to unlawful imprisonment, and remanded for re-sentence. Appellant was re-sentenced to a term of four years' imprisonment. Leave to appeal to the New York Court of Appeals was

denied on April 2, 1976. Appellant then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of New York. The petition was denied on October 12, 1976.

## Statement of Facts

### I. State Trial Proceedings

#### A. Introduction

Petitioner-appellant Macio Ennis was charged with burglary in the third degree and kidnapping in the second degree (7*). The prosecution's theory of the case was that appellant had attempted to sexually assault Bertha Reed and, during that attempt, restrained her against her will, thus committing the crime of kidnapping (12-15).

The State's case relied primarily on Ms. Reed's testimony, since she was the only witness to identify appellant as her assailant.

#### B. The Wade Hearing

The transcript of the trial reveals that on the morning of June 12, 1974, prior to Reed's testimony and outside the presence of the jury, a Wade hearing was conducted to determine

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*Numerals in parentheses refer to pages of the transcript of the trial, a copy of which will be docketed as part of the record on appeal.

the defense challenge to the pretrial identification procedures (16-17, 60-61).* The minutes of this hearing were never transcribed, and they are not now available to counsel without payment of the cost of transcription.** However, portions of the trial transcript indicate, generally, the subject of the testimony elicited at the hearing. Defense counsel explained that he was challenging Reed's ability to present an in-court identification on the ground that pretrial identification procedures were so suggestive as to taint any subsequent identification and to result in a substantial likelihood of misidentification (19).

It appears from the arguments of counsel and Reed's testimony during the trial that at some time prior to trial Reed participated in a courtroom show-up with appellant (17, 83-83) and that she had also been shown a photographic spread which included appellant's photograph (83-84). Nowhere in the record as it currently stands are the facts of these two pretrial identification procedures revealed.

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*Defense counsel attempted to impeach Reed's testimony with the testimony she had given earlier that morning at the hearing (89-92).

**An affidavit of Hayward C. Davis, an official court reporter, dated November 20, 1975, affirms that the Wade hearing was held on June 12, 1974, and that, as of November 20, 1975, the minutes had not been transcribed. The affidavit is annexed to respondent's affidavit in opposition filed in the district court, and is Document #5 to the record on appeal.

C. The Trial

Bertha Reed testified that on the morning of January 30, 1973, she was in the laundry room of the apartment building where she lived on Fenimore Street in Brooklyn, New York (67). While she was sitting in the laundry room waiting for her laundry to dry, a man approached her from behind, put his hand around her neck, and held a straight edged razor up against her skin (72). Still behind her, the man directed Reed to the adjacent incinerator room where, as ordered, she closed the door behind them and turned off the lights (73-74). Then, still in the dark, the man ordered Reed to undress (74). While Reed was disrobing, Henry Woodson, the superintendent of the building, opened the incinerator room door. The assailant ran out, passed the superintendent, and escaped (75). According to Reed, she caught a "glimpse" of the assailant's face as he was fleeing (75).* Reed identified appellant as that man (77).**

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*Superintendent Woodson did not see the attacker's face and could not identify him.

**Reed also testified to two pretrial identifications of appellant. The first occurred when she accompanied a Detective Heinson to the Criminal Court at 120 Schermerhorn Street in Brooklyn where she was brought face to face with appellant (82). The second identification was photographic, and was made from a spread of photographs (83). The record does not show who else was present when Reed saw appellant at criminal court or which other photographs appeared in the spread.

Reed testified that earlier that morning she saw appellant in the elevator of her building. Although nothing untoward occurred at that time, Reed claimed to remember that appellant was then wearing a brown leather midi-coat (78-79). During the course of the subsequent attack, Reed asserted that she noticed that the assailant was wearing a brown leather coat (72, 81).

Henry Woodson testified that when he opened the door to the incinerator room, someone, whom he could not identify, brushed past him. Reed shouted to Woodson, "Stop that man, this man was trying to rape me" (34). Woodson didn't follow the man, who fled to the rear exit of the building, but went instead to the front door and observed an individual he thought was the same man enter a car. Woodson recorded part of the license number, which was, according to the State's theory, partially incorrect and partially incomplete (35). Woodson did not identify appellant as the man who fled the incinerator room or the man he observed entering the car.

Detective Heinsohn testified that he investigated the license number recorded by Woodson -- Y6843 -- and found that that license plate had been returned to the New York State authorities (159). Heinsohn then began to check other combinations and discovered that a Rose Brown owned a 1970 gold-colored Pontiac* with license number FI6843.

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*On cross-examination, Heinsohn revealed that Woodson had described the escape car as "brown" (165).

Rose Brown testified that she owned a Pontiac bearing license number FI6843, but that appellant used it (200). On cross-examination, Brown admitted that she did not know everyone who drove her car: "It was just registered in [her] name" (201).

The jury convicted appellant of kidnapping in the second degree, and acquitted him of the robbery charge (378). He was sentenced to a five to 15 year term of imprisonment.

D. Appeal to the New York State Appellate Division

On appeal to the Appellate Division, Second Department, appellant, who was indigent, was assigned §18-B panel counsel, David Feinman. Mr. Feinman was not the lawyer who represented appellant at trial.* Although the transcript of the trial court proceeding was obviously incomplete in that the minutes of the Wade hearing had not been transcribed, counsel never ordered the missing minutes.

When appellant, who was then incarcerated, learned that the transcript of the Wade hearing had not been made part of the record on appeal, he attempted to get the transcript through correspondence with the court reporter, Hayward Davis,** and

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*The record reveals that trial counsel was Seymour Friedman.

**See copy of a letter from Hayward Davis made part of the record on appeal and annexed as "D" to appellant's separate appendix.

his counsel.* Davis told appellant that he would have to supply the specific date of the missing minutes and provide for the method of payment as well.

When appellant's personal efforts to obtain the transcript failed, he filed a motion in the Appellate Division asking that assigned counsel be relieved. That motion, to which counsel did not object, was denied.**

Appellant then filed a pro se supplemental brief in the Appellate Division, arguing that the incomplete record denied him adequate appellate review.***

On December 31, 1975, the Appellate Division modified the conviction for kidnapping in the second degree, found appellant guilty of the lesser-included offense of false imprisonment, and remanded the case for re-sentence.**** People v. Ennis, 50 A.D.2d 935 (2d Dept. 1975), annexed as "C" to appellant's separate appendix. The court did not address the issue raised

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*In his petition to the district court, appellant alleges that he wrote to counsel requesting that counsel order the minutes.

**Counsel's affirmation in response to the motion to be relieved is annexed to appellant's "affidavit in rebuttal," Document #8 to the record on appeal and annexed as "E" to appellant's separate appendix.

***See affidavit of Assistant District Attorney Barbara L. Linzer at page 2, annexed to the affidavit of Assistant Attorney General Thomas Bartley in opposition, filed in the United States District Court for the Eastern District of New York and Document #5 to the record on appeal.

****On January 21, 1976, appellant was re-sentenced to a term of four years' imprisonment.

in appellant's pro se supplemental brief.*

E. Motion in the Appellate Division for Re-Argument

On January 8, 1976, in the Appellate Division, Second Department, appellant filed a motion to re-argue his appeal, on the ground that he was denied adequate appellate review because the record on appeal was incomplete. Specifically, appellant argued that he had informed his §18-B panel lawyer that the Wade hearing transcript was missing and that identification was an issue in the case.** The State admitted that the record on appeal had been incomplete, but contended that the deficiencies were attributable to appellant through his lawyer.*** On February 5, 1976, the motion was denied.****

## II. Federal Court Proceedings

On May 18, 1976, appellant filed a pro se petition for writ of habeas corpus (28 U.S.C. §2254) alleging, inter alia, that (1) he was denied adequate appellate review, and hence

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*Leave to appeal to the New York Court of Appeals was denied.

**A copy of the motion is annexed to the affidavit in opposition filed in the district court by Assistant Attorney General Thomas P. Bartley, Document #5 to the record on appeal.

***The affidavit of Assistant District Attorney Barbara L. Linzer is annexed to the affidavit in opposition filed in the district court, Document #5 to the record on appeal.

****The order is annexed to the affidavit in opposition filed in the district court, Document #5 to the record on appeal.

due process, by the State's refusal to supply him with the transcript of the Wade hearing for purposes of appeal, and (2) that appellate counsel was incompetent.

On October 12, 1976, The Honorable Mark A. Costantino denied the petition. On the missing transcript issue, the court found:

> Petitioner's first claim is without merit. He argues that he was denied due process and equal protection because, due to his indigency, the minutes of his Wade hearing were not included in his record on appeal. This claim is totally unsupported by the record. While it is true that the minutes of the Wade hearing were not included in the appellate record, there is nothing to indicate that the petitioner was denied access to the minutes by any action on the part of the State, or that he was denied access due to his indigency. In fact, it appears that the minutes were available, but were never properly requested either by petitioner or his counsel. Moreover, there are no allegations in the petition as to how petitioner was prejudiced by the omission of the minutes from the record. He does not allege that there were defects in the hearing procedure or that the inclusion of the minutes in the record on appeal would have in some way altered the outcome of his appeal. Absent such allegations going to the sufficiency of the evidence adduced at the hearing, petitioner's due process and equal protection claims must be denied. See United States ex rel. Buford v. Henderson, 524 F.2d 147 (2d Cir. 1975), cert. denied, ___ U.S. ___, 96 S.Ct. 1133 (1976).
>
> Memorandum and Order at 2-3.

On the issue of incompetence, the court below found:

> ... It is not clear from the petition whether the motions to replace counsel were raised during trial or were made for the first time with respect to the prosecution

of the appeal. However, at neither time did petitioner have the "unbridled right to reject counsel and demand another." United States v. Calabro, 467 F.2d 973 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973), reh. denied, 411 U.S. 941 (1973). See also United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir.), cert. denied sub nom. Santoro v. United States, 409 U.S. 1063 (1972). ("No defendant has an absolute right to any particular counsel.")

In order to warrant a substitution of counsel, the defendant must show good cause, such as a conflict of interest. United States v. Calabro, supra. In the case before this court, while petitioner has used the words "conflict of interest" in his petition, he has alleged no facts which justify the conclusion that such a conflict existed. Differences between attorney and client over strategy are not of themselves sufficient to require replacement of counsel, particularly where the attorney indicates his willingness to continue with the case. Calabro, supra at 986.

Here, it is true that petitioner's counsel filed papers with the Appellate Division to the effect that he would not oppose his client's motions to relieve him. When the motions were denied, however, counsel continued to prosecute the appeal. The effectiveness of counsel's efforts is evidenced by the fact that he obtained a modification of the conviction. Petitioner has failed to show that there was good cause to replace his attorney and he has failed to show that the assistance he received was ineffective. Therefore, his petition cannot be granted on those grounds.

Memorandum and Order at 3-5.

## ARGUMENT

### Point I

DUE PROCESS WAS DENIED TO APPELLANT, AN INDIGENT, BY THE STATE'S REFUSAL TO PROVIDE THE TRANSCRIPT OF THE WADE HEARING FOR PURPOSES OF DIRECT APPEAL.

The adjudication of an indigent's direct appeal without review of a significant portion of the transcript by the New York State appellate court, assigned appellate counsel, or appellant was a denial of due process and equal protection of the law, and mandates reversal of the district court order and a grant of the writ of habeas corpus.

The law is clear that a state cannot deprive an indigent defendant of an appellate review of the same scope and quality available to defendants who can afford to pay for an appeal. Douglas v. California, 372 U.S. 353, 357-358 (1963); Griffin v. Illinois, 351 U.S. 12, 19 (1956). These rights include access to the essential and relevant portions of the transcript of the proceeding from which the appeal is taken. Mayer v. City of Chicago, 404 U.S. 189 (1971); Williams v. Oklahoma City, 395 U.S. 458 (1969); Hardy v. United States, 375 U.S. 277 (1964); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, supra, 351 U.S. 12.

In Mayer v. City of Chicago, supra, 404 U.S. at 194, the Supreme Court reaffirmed that:

> ... [i]n terms of a trial record, this means that the State must afford the indigent a "'record of sufficient completeness' to permit proper consideration of [his] claims." Id., at 499 (quoting Coppedge v. United States, 369 U.S. 438, 446 (1962).

Further, the Court held that:

> We emphasize, however, that the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way. Moreover, where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an "alternative" will suffice for an effective appeal on those grounds.
>
> Id., 404 U.S. at 195.

New York law provides that the appellate court will order that the criminal court furnish an indigent defendant or his counsel a copy of the transcript where such is necessary to perfect an appeal. N.Y. Crim. Proc. Law §460.70 (McKinney's 1971); Rules of Supreme Court, Appellate Division, Second Department §670.17 (McKinney's 1975); C.P.L.R. §5526 (McKinney's 1963).

In this case, this New York law was not applied, and so appellant was denied the full appeal guaranteed by the State. The record establishes without contradiction that the direct appeal of appellant's conviction for second degree kidnapping was presented, heard, and determined without benefit of a complete record of the trial court proceedings. Missing in this case, where a primary defense at trial had been a challenge to

identity, were the minutes of a Wade hearing. Obviously, if appellant had had the money, he would have been able to obtain the missing portion of the transcript merely by paying the court reporter. Unfortunately, that avenue was not open to appellant. As an indigent who was incarcerated during the appellate process, he had to resort to correspondence with his newly-assigned counsel, the court reporter, and finally pro se with the New York State Appellate Division, to obtain the absent portions of the record. These efforts were to no avail.

Specifically, appellant wrote to the court reporter to ask for the transcript. The request was met not with the minutes, but rather with a return inquiry about how appellant would pay for them. Appellant, a layman, apparently did not know and was not able to comply with the precise means to arrange for payment. See Jackson v. Turner, 442 F.2d 1303, 1307 (10th Cir. 1971). Assigned counsel provided no assistance in this regard. Surely it was the duty of newly-assigned counsel, who had not been counsel at trial, to obtain a complete transcript of the trial proceedings, especially in light of the record in this case. But counsel here failed, even in the face of appellant's repeated requests, to do so.

Appellant, having failed to get aid from his counsel, turned to the court. First, he moved to have his assigned counsel relieved on the ground that he refused to raise valid issues on appeal. When that motion was denied, appellant filed a pro se brief which set forth the assertion that the absence

of the Wade hearing transcript precluded adequate appellate review.

On this record, the obligation to insure that an adequate appeal was presented fell to the Appellate Division. United States ex rel. Maselli v. Reincke, 383 F.2d 129, 134 (2d Cir. 1967); Blanchard v. Brewer, 429 F.2d 89, 91 (8th Cir. 1970); Turner v. State of North Carolina, 412 F.2d 486 (4th Cir. 1969); cf. United States ex rel. Witt v. LaVallee, 424 F.2d 421 (2d Cir. 1970); United States ex rel. Smith v. McMann, 417 F.2d 648 (2d Cir. 1969). That court unquestionably had notice of the problems in this case: it had appointed §18-B counsel who had not represented appellant at trial; it had denied appellant's motion to relieve that counsel -- a motion made on the ground that counsel refused to present viable issues in the case; and it reviewed, but declined to rule on, appellant's pro se supplementary brief, which argued that adequate review was precluded by the absence of the Wade hearing minutes.

On facts analogous to those presented in this case, this Court, in United States ex rel. Maselli v. Reincke, supra, 383 F.2d at 134, granted a writ when the lawyer failed to prosecute an appeal, and stated:

> [T]he states are responsible for the operation of their systems of criminal justice.

In Maselli, the Connecticut courts, like the New York court in this case, had "full knowledge" of the deficiencies in the record before them and of counsel's inability -- since he had not

been trial counsel -- to adequately present the appeal without first reviewing the portions of the transcript that were missing. United States ex rel. Maselli v. Reincke, supra, 383 F.2d at 135 n.8.

In this case, the missing transcript certainly appears to have been germane to the appeal.* The prosecution's case relied primarily on the eyewitness identification by Bertha Reed, and the defense at trial was an attempt to establish that Reed had not had sufficient opportunity at the time of the crime to observe and identify her attacker. Part of this challenge was the defense contention that Reed's identification was not the result of her observations during the crime, but rather was the product of two suggestive pretrial identification procedures. The possibility that the suggestive pretrial procedures were used is reflected by the trial record, which indicates that there was a physical show-up as well as a photographic spread.

The testimony at trial reveals that, throughout the commission of the crime, the assailant successfully concealed his face from view. Reed caught a mere "glimpse" of her attacker as he was fleeing from the incinerator room. Moreover, the remainder of the evidence at trial was not so forceful as to obviate the need to explore the pretrial suggestiveness of the

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*It is worthy of note that as a matter of fact the State of New York has never contended that the Wade hearing minutes were irrelevant to the appeal.

identification procedures. The license number Woodson recorded* and that of the Pontiac appellant allegedly drove were not the same. Moreover, the color of the getaway car and the Pontiac were different. Finally, appellant was not the only person who had access to that car. In this context, Reed's identification testimony and the pretrial identification procedures to which she was subjected were critical.**

Only the minutes of the Wade hearing provide the factual details of those two pretrial identifications. Without those minutes, there is no way to discern whether the procedures used were impermissibly suggestive.

The appeal could not have been adequately presented or determined without evaluating the evidence presented at the Wade hearing. The refusal to make the transcript of the Wade hearing available to appellant deprived him of his right to due process and equal protection of the law.

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*As an initial matter, Woodson, who could not identify the assailant, did not keep him in view throughout, thus calling into question Woodson's conclusion that it was the assailant he saw getting into the car.

**Of course trial testimony about pretrial identifications which are impermissibly suggestive is error. See Braithwaite v. Manson, 527 F.2d 363 (2d Cir. 1975), cert. granted, 96 S.Ct. 1737 (1976).

## Point II

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY THE KNOWING FAILURE OF HIS ASSIGNED APPELLATE COUNSEL TO OBTAIN THE MISSING TRANSCRIPT OF THE WADE HEARING FOR PURPOSES OF THE DIRECT APPEAL.*

A defense attorney's failure to take an appeal from a conviction when the defendant requests such an appeal constitutes incompetence of counsel. Flanagan v. Henderson, 496 F.2d 1274, 1277 (5th Cir. 1974); Rosinki v. United States, 459 F.2d 59 (6th Cir. 1972); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971); Blanchard v. Brewer, supra, 429 F.2d 89; Kent v. United States, 423 F.2d 1050 (5th Cir. 1970); Thomas v. Beto, 423 F.2d 642 (5th Cir. 1970); Gairson v. Cupp, 415 F.2d 352 (9th Cir. 1969); United States ex rel. Maselli v. Reincke, supra, 383 F.2d 129. Some courts have held that such neglect amounts to per se incompetence. Flanagan v. Henderson, supra, 496 F.2d 25 1277; Blanchard v. Brewer, supra, 429 F.2d at 90. Even if counsel preserves the right to appeal and, indeed, presents to the court some issues, constitutional standards of competence are not met if the result of such conduct is only an abbreviated appeal. Entsminger v. Iowa, 386 U.S. 748 (1967); Chapman v. United States, 459 F.2d 634 (5th Cir. 1972); Flanagan v. Henderson,

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*A motion requesting a certificate of probable cause on this question is submitted with this brief. This Court is respectfully asked to consider this argument in support of the motion and on the merits, since the issue is inseparably intertwined with the State's denial of the Wadé transcript.

supra, 496 F.2d at 1278.

An abbreviated appeal is all appellant got from his assigned counsel here.* Assigned appellate counsel failed to obtain the missing trial court transcripts although he knew of their existence from his reading of the record as well as from his communications with appellant. As a result of counsel's inaction, the presentation provided for the appeal to the New York State Appellate Division was incompetent. A significant portion of the record going to the question of appellant's guilt or innocence was simply not examined and read and researched by counsel, and not before the appellate court for review.

The error in this case is particularly egregious because it meant that no one at any time has ever evaluated the evidence presented at the Wade hearing to determine whether there had been suggestive pretrial identification and, if so, what effect that would have had on Reed's ability to make an in-court identification. Hardy v. United States, supra, 375 U.S. at 281. Before counsel can conclude that there is no legally non-frivolous issue to present on appeal, he must make a thorough and detached examination of the facts and the law. Anders v. California, 386 U.S. 738, 744 (1967); Suggs v. United States, 391 F.2d 917 (D.C. Cir. 1968). Appellate counsel here could

*That counsel obtained partial relief for appellant on the direct appeal is not to the contrary. A successful challenge to the eyewitness identification would have resulted in a compete reversal of the conviction.

counsel here could not have performed that function without the transcript of the Wade hearing since he had not represented appellant at trial, and therefore could not have known what the hearing established.

Counsel's failure to obtain a complete and accurate record on appeal amounts to ineffective assistance of counsel, and mandates that the writ be granted.

## CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and the writ granted unless the Wade hearing transcript is provided and appellant is afforded full appellate review of the issues presented.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MACIO ENNIS
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

CERTIFICATE OF SERVICE

February 17, 1977

I certify that a copy of this brief [redacted] has been mailed to the Attorney General of the State of New York.

Ryan SK Bar